(26,471).

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD SHALER & HALL QUARRY COMPANY,
Plaintiff-in-Error,

AGAINST

WILSON S. BRICE, as Executor, etc. and THE AMERICAN SURETY COMPANY OF NEW YORK,
Defendants-in-Error.

To WINTHROP & STIMSON, ESQS.,
Attorneys for The American Surety Co.,
Defendant-in-Error, and to
WILSON S. BRICE, as Executor, etc.,
Defendant-in-Error in Person.

GENTLEMEN:

Please take notice that on the 24th day of February, 1919, the plaintiff-in-error will present to the Supreme Court of the United States, in the matter above entitled, a motion to advance the hearing of said cause; of which motion a copy is hereto annexed. I also deliver to you herewith 5 copies of the brief that will be presented by plaintiff-in-error with the motion.

Yours, etc.,
EDWIN D. WORCESTER,
Attorney and Counsel for Plaintiff-in-Error,
30 Broad St.,
Borough of Manhattan,
City of New York.

(26,471)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD SHALER & HALL QUARRY COMPANY,
Plaintiff-in-Error,

vs.

WILSON S. BRICE, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and THE AMERICAN SURETY COMPANY OF NEW YORK,
Defendants-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

And now, this 24th day of February, 1919, comes the Plaintiff-in-Error, by its counsel, and moves the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below, and this Writ of Error is sued out under Section 238 of the Judicial Code.

EDWIN D. WORCESTER,
Counsel for Plaintiff-in-Error.

THE BRIEF.

1. Nature of the action and the errors complained of.

This is a common-law action brought to recover $20.000. that had been assigned to the plaintiff out of a certain remainder-interest in a fund of money, and brought also against the bondsman of the life-tenant of such fund. Both defendants interposed answers to the complaint; neither of these answers contains any plea or objection to the jurisdiction. The issues of fact having been brought on for trial, and before any evidence was given, the defendants moved on the pleadings to dismiss the complaint, on the ground that, by reason of the provisions of Subdivision 1 of Section 24 of the Judicial Code, the Court was without jurisdiction. This motion will be found on pages 32 and 33 of the record. The motion was granted, on the sole ground of lack of jurisdiction; and the court ordered certain matter to be annexed to the record (fol. 61). The certificate of the trial judge sets forth the reasons that moved him (see p. 42). The plaintiff thereupon sued out this writ of error directly to the Supreme Court of the United States. The only errors assigned are

1. That the learned District Court erred in dismissing the complaint in this cause for lack of jurisdiction.

2. That the learned District Court erred in refusing to maintain jurisdiction of the claim set forth in the complaint (see fol. 75).

2. Statement of Facts.

Jane C. Van Schaick, of Albany, New York, was at the time of her death the owner of certain lands situated in the counties of Albany and Rensselaer in that State. By her last will she devised an undivided one-half part of those lands to her cousin, Henry Van Schaick, of New York, for his life only, with remainder to the descendants of Henry Van Schaick who should be living at the time of his decease (fol. 3). Henry Van Schaick survived Jane, and at the time of her death had four children, then living, to wit: George Gray Van Schaick, Elizabeth Boutourline, Eugene Van Schaick, and Henry S. Van Schaick (fol. 4). In September, 1894, Eugene Van Schaick, through an intermediary, assigned all his said remainder interest to his wife, Sarah H. Van Schaick (fols. 4, 5).

In January, 1896, one John Van Schaick Oddie commenced an action for the partition of the said lands of Jane C. Van Schaick. This action of partition was brought in the New York Supreme Court, County of Albany, and among the parties defendant thereto were Henry Van Schaick, Eugene Van Schaick and Sarah H. Van Schaick, his wife, Henry S. Van Schaick, George Gray Van Schaick, and Elizabeth Boutourline (fol. 5). October 27, 1896, an interlocutory judgment was entered in this action, adjudging (among other things) that the said Henry Van Schaick had a life-estate as tenant in common in one undivided half part or moiety of said lands; and that Henry S. Van Schaick, George Gray Van Schaick, Elizabeth Boutourline and Sarah H. Van Schaick, wife

of Eugene Van Schaick, had equal vested estates in remainder in the same moiety. It was further adjudged that in each case, except that of Sarah H. Van Schaick, such vested remainder was limited to commence in possession upon the death of said Henry Van Schaick, and was liable to be divested by the death of the owner in said Henry Van Schaick's lifetime; and if so divested, the share would vest in the descendants of the one so dying, and failing such descendants, would vest in the then-living descendants of said Henry Van Schaick. It was further adjudged that, in the case of Sarah H. Van Schaick, her vested remainder was limited to commence in possession upon the death of said Henry Van Schaick if her husband Eugene Van Schaick should then be living; and was liable to be divested by the death of said Eugene Van Schaick in the lifetime of said Henry Van Schaick, and if so divested, said share would vest in the same manner as in the case of shares of the children of said Henry Van Schaick (fols. 5, 6).

The said interlocutory judgment further adjudged that actual partition of said lands could not be made without great prejudice to the owners, and accordingly ordered that the lands be sold at public auction according to law and the practice of the court; and appointed a referee to sell (fol. 6). The referee subsequently sold said lands and made report to the Court, and on December 5th, 1896, final judgment was entered. This final judgment confirmed the referee's report, and validated the sales reported by him; and directed him, out of the proceeds, to pay certain charges specified, and to

deposit the balance of such proceeds in the Albany Savings Bank until further order (fol. 7). Still later, and on January 22, 1897, the referee reported that he had made the payments directed, and that the net proceeds of the sales, after such payments, were the sum of $134,369.74 (fol. 8). Thereafter and under date the 1st day of February the said Court made an order or decree of distribution of the said sum of $134,369.74. A copy of said order or decree is annexed to the record herein, marked Schedule "A", see page 33, folios 62 to 69.

This distribution decree determined, among other things, that one-half of said net proceeds, being the sum of $67,184.87, belonged to Henry Van Schaick for his life; and that at his death it would pass to and vest absolutely in such of his descendants as should then be living, *or in such persons as shall then be the legal owners or holders of said vested sub-shares by assignments from said surviving descendants;* and, it being impossible to determine at that time the persons to whom the said share and its several divisions would be payable at the death of Henry Van Schaick, it was ordered that if within twenty days Henry Van Schaick "shall furnish proper security, as hereinafter provided, for the safe keeping and preservation of the said sum during his lifetime, to the end that at his decease the same may be paid over and distributed *per stirpes* among the descendants of the said Henry Van Schaick *and the persons to whom the said share shall then belong*", that then the said moiety should be immediately paid over by the Referee

to Henry Van Schaick. The decree further provided that the said security might consist of a bond, by Henry Van Schaick as principal and the American Surety Company, a New York corporation, as surety, "to the descendants now living of the said Henry Van Schaick who are parties to this action, and to such other descendants of the said Henry Van Schaick as shall survive him, *and to such other persons as shall be entitled, upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest*"; said bond to be in the penal sum of $75,000 and to be void if Henry Van Schaick should, during his lifetime, safely keep and preserve the principal of said share, which bond should be approved by a Justice of the Court, and filed in the Albany County Clerk's office.

Thereafter, a bond was in fact executed by said Henry Van Schaick and the American Surety Company and was approved by a Justice of the Court, and was filed in the Albany County Clerk's Office (fol. 11). A copy of this bond forms Exhibit A annexed to the Complaint herein, and will be found in folios 16 and 17 of the record. This bond bears date February 3, 1897. It is made by said Henry Van Schaick as principal and American Surety Company as surety who are held and bound "unto such descendants of the said Henry "Van Schaick as shall be living at the time of his "death in the sum of seventy-five thousand dollars "($75,000) lawful money of the United States, to "be paid to them, their executors, administrators "*or assigns*". It then refers to the order or decree

of distribution, and concludes with the following condition:

"Now, therefore, the condition of this obligation is such that if the above bounden Henry Van Schaick shall during his lifetime, safely keep and preserve the principal of said Sixty seven thousand, one hundred and eighty four dollars and eighty seven cents ($67,184.87), and if such sum of $67,184.87 shall thereafter be duly accounted for and paid to his descendants *as provided in the decree aforementioned*", then the obligation to be void, else to remain in full force and effect (fol. 17),

Upon the filing of this bond, the Referee paid over to Henry Van Schaick the said $67,184.87.

Thereafter, the interest in said remainder held by Sarah H. Van Schaick was by various mesne assignments transferred from her back to her husband Eugene Van Schaick, who had originally owned it (see fol. 5 and fol. 12); and on April 21, 1898, he was again the owner of said sub-share of said remainder.

Thereafter on May 9, 1901, for good and valuable consideration Eugene Van Schaick assigned to the plaintiff, The Brainerd Shaler & Hall Quarry Company, the gross sum of $20,000 to be paid out of his said remainder interest (fol. 12). This assignment is Exhibit B, annexed to the Complaint, and will be found at folios 18 to 20 (pp. 9 and 10). This instrument recites that Henry Van Schaick, the assignor's father, holds for life the sum of $67,184.87, being proceeds of a sale in partition of lands whereof one Jane Van Schaick had devised an undivided one-half to said

Henry Van Schaick, which sum was paid over to him pursuant to a decree of distribution (reciting the action and decree already hereinbefore referred to); and recites that the reversion and remainder of an undivided one-third part of said $67,184.87 belongs to and is vested in the assignor, subject however to be divested by his death occurring before the death of the said Henry Van Schaick. (It should be noted that Henry S. Van Schaick, Eugene's brother, died prior to his father, Henry Van Schaick, without issue (fol. 12), whereby Eugene's sub-share was increased to a one-third share). And after these recitals, the assignor assigned to the assignee (the plaintiff) the sum of $20,000. to be payable out of the assignor's said one-third interest in the said proceeds of sale now in the hands of Henry Van Schaick, together with all the assignor's interest in said remainder up to the sum of $20,000. aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick. With covenants of title and warranty.

Henry Van Schaick died on or about November 15, 1914 (fol. 13).

He left him surviving the said George Gray Van Schaick, Elizabeth Boutourline, and Eugene Van Schaick (fol. 13) (Henry S. Van Schaick had died before him without issue), and no other living descendant. Letters-testamentary upon his estate were duly issued by the Surrogates' Court of New York County to Eugene Van Schaick and the defendant Wilson B. Brice (fol. 13).

Thereafter, Eugene Van Schaick died, on or about January 27, 1916 (fol. 13).

Henry Van Schaick did not during his lifetime safely keep or preserve the principal of said $67,-148.67, and the said sum has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs, as provided for in the decree mentioned in the bond, and had been wholly lost prior to Henry Van Schaick's death (fol. 13); and plaintiff prior to the commencement of this action duly demanded from defendant Brice as executor payment of the said assigned $20,000. (fols. 13, 14).

Thereafter, this action was commenced in the District Court of the United States for the Southern District of New York. Plaintiff is a Connecticut Corporation, and is a citizen and resident of Connecticut. Both of the defendants are citizens and residents of New York. Eugene Van Schaick in his lifetime and at his death was a citizen and resident of New York (fol. 61).

Both defendants interposed answers, neither of which contained any objection to the jurisdiction. The issues of fact having come on for trial, and before any evidence had been given, the defendants moved on the pleadings, under Subdivision 1 of Section 24 of the Judicial Code, to dismiss the complaint on the ground that the District Court was without jurisdiction (fol. 61). The grounds of the motion were:

> "Because the plaintiff in this action sues by virtue of an assignment from one Eugene

> Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the State of which both defendants are residents and citizens" (fol. 61).

Before deciding the motion, and upon plaintiff's motion, the Court ordered that the said order or decree of distribution should be deemed to have been put in evidence by the plaintiff as a part of the record on which the motions to dismiss would be considered (fol. 61).

The Court then considered and granted the motions to dismiss, and the plaintiff noted an exception to such decision. The trial-judge thereafter made his certificate, setting forth the grounds upon which he granted the motion, which grounds are as follows (fols. 80, 81):

> "This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the

> State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

The plaintiff then sued out this writ of error to the United States Supreme Court.

FIRST POINT.

The fact that the action is based upon an assignment of a remainder-interest does not oust the District Court of jurisdiction.

Both under this and under the succeeding points, the grounds upon which the learned District Court refused jurisdiction cannot be better stated than in the careful certificate of the District Judge (see p. 42). His words are as follows:

> "This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the con-

tinuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

So far as this objection is based upon the undoubted assignment by Eugene Van Schaick to the plaintiff of a part of his interest in such fund, it is believed that the objection is fully covered and refuted by the decision in

Brown *v.* Fletcher, 235 U. S. 589.

SECOND POINT.

So far as the objection is based upon the fact that the action is brought to recover on the bond, that fact did not justify the District Court in refusing jurisdiction.

We refer again to the certificate of the District Judge, quoted in the foregoing point.

The complaint neither alleges nor counts upon any assignment of the bond. The certificate of the District Judge does not assert that any such assignment was ever made. In fact, Eugene Van Schaick never did assign the said bond or his interest therein.

It is the theory and contention of the plaintiff that when once Eugene Van Schaick had assigned the share in his remainder interest, the bond, so far as it related to that interest, passed to the plaintiff without assignment, and that no assignment of the bond was necessary. The plaintiff considers that the Surety Company's obligation was given for the protection of whosoever should hold and own Eugene's remainder interest at the death of Henry Van Schaick. Such holder and owner of Eugene's interest would need no assignment of the defendant Surety Company's obligation. That obligation passed to such owner and holder without assignment, in the same way that the obligation of a warranty, in a deed of conveyance, passes to subsequent purchasers of the land.

If the plaintiff is right in this theory, and if also the assignment of Eugene Van Schaick's interest in the fund is not within the prohibition of Section 24, then, plainly, the District Court should have retained jurisdiction.

If, however, the plaintiff is wrong in this theory, and cannot, under common-law rules, maintain an action on the bond unless it can show a special assignment thereof, then the plaintiff must lose its action on the merits. But this is matter of defence, to be raised by demurrer or answer, but not to be raised by a plea to the jurisdiction.

In other words, and so far as this motion is concerned, *there is no assignment of the bond in the case.* The learned District Court should not have considered it at all, much less have made it the ground for refusing jurisdiction.

THIRD POINT.

The question of whether or not Eugene Van Schaick's interest in the bond passed to the plaintiff without assignment (it being conceded that, if it did not, the plaintiff's case fails on the merits), remits that whole question to a trial of the merits. Such question on the merits cannot be and ought not to be, raised before this Court on an objection to jurisdiction. It seems therefore out of place to argue here the question of whether an assignment was necessary.

Nevertheless, the plaintiff in error desires to submit certain considerations tending to show that its claim (that no assignment was necessary) is well grounded, and raises, to say the very least, a genuine and colorable contention.

An examination of the decree of the court under and in pursuance to which the bond was given, shows that the said bond was for the safekeeping and preservation of the fund by Henry Van Schaick during his life

> "to the end that at his decease the same may be paid over and distributed *per stirpes* among the descendants of the said Henry Van Schaick *and the persons to whom the said share shall then belong*" (fol. 68),

and that, at the time of the decree, one of said shares already belonged to a person who was not a descendant of Henry Van Schaick, namely, to Sarah H. Van Schaick, the wife of Eugene. The decree further provides that the bond shall run

> "to the descendants now living of the said Henry Van Schaick who are parties to this action and to such other descendants of the said Henry Van Schaick as shall survive

> him, *and to such other persons as shall be entitled upon the death of the said Henry Van Schaick to receive any portion of the share * * * in which he has a life interest*" (fol. 68).

The bond given in pursuance of this decree runs to

> "Such descendants of the said Henry Van Schaick as shall be living at the time of his death to be paid to them, their executors, administrators *and assigns*" (fol. 16).

The "assigns" here intended are obviously persons to whom any of the descendants of Henry Van Schaick, who should survive him, should have assigned such descendant's *interest in the fund.* The obligation of the bond was not capable of assignment separately, any more than a mortgage of real property can be assigned separately from the debt which it secures.

And the condition of the bond is that the said fund

> "Shall thereafter (*i. e.*, after Henry Van Schaick's death) be duly accounted for and paid to his descendants *as provided for in the decree aforementioned*" (fol. 17).

The collateral obligation of the surety named in this bond, like the direct obligation of a guarantor, is general and not special, and passes, *without assignment*, to any person to whom the principal interest that it is intended to secure shall pass.

> Stillman *v.* Northrup, 109 N. Y. 473;
> Everson *v.* Gove, 122 N. Y. 290;
> Levy *v.* Cohen, 103 App. Div. (N. Y.) 195.

The bond in this case is similar in many respects to an administrator's bond given to secure the interests of distributees in the estate of an intestate; and the obligation of a surety on such an administrator's bond passes, without any assignment, to anyone to whom a distributee has assigned a portion of his distributive interest.

Bertha Zinc & Mineral Co. *v.* Vaughan & others, 88 Fed. Rep. 566.

By analogy, an appeal-bond passes without assignment to an assignee of the judgment, as being a mere incident thereto.

Tompkins *v.* Gerry, 52 Ill. Appeals, 570;
Brandt on Suretyship, Vol. 2, Section 520.

A lessee's covenant to pay rent follows the reversion; and upon any transfer of the reversion, the right to receive the rent goes with it, without assignment, as being a part and incident of the reversion.

Butt *v.* Ellett, 19 Wallace, 544;
Marshall *v.* Moseley, 21 N. Y. 280.

Respectfully submitted,

EDWIN D. WORCESTER,
Attorney and Counsel for Plaintiff-in-Error.

WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff in the District Court,
30 Broad Street, New York.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 431.

THE BRAINERD, SHALER & HALL QUARRY COMPANY,
Plaintiff-in-Error,

AGAINST

WILSON B. BRICE, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the AMERICAN SURETY COMPANY,
Defendants-in-Error.

BRIEF FOR AMERICAN SURETY COMPANY, DEFENDANT-IN-ERROR.

Statement.

This is a writ of error to the District Court of the United States for the Southern District of New York. The sole question involved is the jurisdiction of the District Court.

At the opening of the case each of the defendants moved on the pleadings to dismiss the complaint

> " on the ground that the District Court of the United States has no jurisdiction under section

24, subdivision 1 of the Federal Code because the plaintiff in this action sues by virtue of an assignment from one Eugene Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the state of which both defendants are residents and citizens" (Record, p. 32, fol. 61).

The District Judge granted the motion and dismissed the complaint on the following ground:

> "This action is brought on a surety bond made by one Henry Van Schaick, since deceased, as principal, and the defendant the American Surety Company of New York as surety, for the purpose of securing the due payment at Henry Van Schaick's death of the remainder interests in a certain fund of money held by Henry Van Schaick as life tenant. That one Eugene Van Schaick, (since deceased), was at the time of the assignment below mentioned the owner of one of the remainder interests secured by said bond; that Eugene Van Schaick, during the continuance of the life estate, assigned to the plaintiff a portion of his said remainder interest and thereafter survived the said Henry Van Schaick, and this action is based on such assignment.
>
> That Eugene Van Schaick was in his lifetime a citizen and resident of the State of New York, and both defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this court upon said remainder interest and said bond, if no such assignment had been made" (Record, p. 42, fol. 80).

The complaint alleges that the two defendants, the American Surety Company and Brice, are both citizens and residents of New York. It was formally conceded that Eugene Van Schaick was also a citizen and a resident of New York (Record, p. 33, fol. 61).

The Facts.

The material facts as shown by the pleadings are as follows:

Jane C. Van Schaick devised to Henry Van Schaick (now deceased) for life, an undivided one-half interest in her real estate. The terms of the devise were as follows:

> "An equal undivided one half part thereof to my cousin Henry Van Schaick of New York for and during his life only and the remainder in fee simple in said half part to the descendants of said Henry Van Schaick who shall be living at the time of his decease and living also at the time of my decease, if I shall survive him" (Record, p. 2, fol. 3).

The other devisees, Henry's co-tenants, instituted a partition suit, in the course of which the real estate was sold, and the interest of Henry Van Schaick and of his descendants came to be represented by cash proceeds amounting to $67,184.87 in the hands of the Referee appointed to sell the property.

The decree of Distribution then directed that this amount should be either (1) paid into court in the usual way, to be invested for the benefit of Henry Van Schaick, the life tenant, or (2) paid to Henry Van Schaick upon his giving the usual security exacted from life tenants (fol. 68). The decree provided that such security bond "may consist of a bond of the American Surety Company", and went on to describe the provisions of the bond.

Thereupon, Henry Van Schaick, the life tenant, as principal, and the American Surety Company as surety, executed a bond for $75,000 to such descendants of the said Henry Van Schaick as should be living at the time of his death, and their assigns.

This bond was duly approved by the Supreme Court and filed and thereupon the fund was paid by the Referee to Henry Van Schaick (Record, p. 6, fol. 11).

The bond was conditioned on the safekeeping of the fund by Henry Van Schaick, the life tenant, for the benefit of the remaindermen.

Henry Van Schaick died on November 15, 1914, leaving three children surviving him. Eugene Van Schaick was one of these children and accordingly became entitled, on the death of his father, to a one-third interest in the fund. After the giving of the bond and the payment of the fund to Henry Van Schaick and on May 7, 1901, Eugene Van Schaick assigned to the plaintiff the sum of $20,000 to be payable out of the interest of the said Eugene Van Schaick in the fund in the hands of Henry Van Schaick, the life tenant. Eugene Van Schaick died on January 27th, 1916 (Record, p. 7, fol. 13).

The complaint then alleges that Henry Van Schaick, the life tenant, did not safely keep the principal of the fund, and it alleges a demand on his executor, the defendant Brice, and his failure to pay. Accordingly, the plaintiff brought this action against the executor of Henry Van Schaick and the American Surety Company, the bondsman, demanding judgment in the sum of $20,000.

FIRST.

The cause of action and the only cause of action stated in the complaint is a cause of action at law on the bond against Henry Van Schaick, the principal, and American Surety Company, the surety.

This is an action at law and was brought on before a court and jury (Record, p. 32, fol. 60). The complaint first states the facts and circumstances above stated under which the court found itself in possession of the fund, and the decree of the court under which the fund might be paid to Henry Van Schaick instead of being retained and invested by the court for his benefit. Those provisions required a bond for the safekeeping of the fund as above stated. The complaint then alleges that a bond was given. The obligors of the bond were Henry Van Schaick as principal, and the American Surety Company as surety; the obligees of the bond were

> "such descendants of the said Henry Van Schaick as shall be living at the time of his death . . . to be paid to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

The condition of the obligation, as stated in the bond, is as follows:

> "The condition of this obligation is such that if the above bounden, Henry Van Schaick, shall, during his lifetime, safely keep and preserve the principal of said Sixty-seven thousand one hundred and eighty-four dollars and eighty seven cents ($67,184.87), and if such sum of $67,184.87 shall thereafter be duly accounted for and paid to his descendants as provided for in the decree aforementioned, then this obligation is to be void, else to remain in full force, virtue and effect" (Record, p. 9, fol. 17).

The complaint then alleges the assignment under which Eugene Van Schaick, the son of Henry Van Schaick, assigned to the plaintiff the principal obligation, to secure which the bond was given, viz., his right, in a portion of the fund. The complaint then alleges the death of Henry Van Schaick and the breach of the condition of the bond in the following language:

> "XV. Upon information and belief, that the said Henry Van Schaick did not during his lifetime safely keep or preserve the principal of said $67,184.87 mentioned in the condition of the said bond, Exhibit A, and that such sum of $67,184.87 has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs, as provided for in the decree mentioned in the said bond" (Record, p. 7, fol. 13).

It then alleges the usual demand and failure to pay, and demands judgment against the executor and the American Surety Company for $20,000, with interest from the date of the death of Henry Van Schaick.

It would seem too plain for argument that this is the ordinary cause of action at law in contract on a surety bond against the principal and surety upon a breach of the condition of the bond.

But the plaintiff seems to indicate in his first point that this action is not brought on the contract obligation of the obligors in the bond, but may be brought for the recovery of property or for the interest in the property under the will of Jane Van Schaick, which was duly assigned to the plaintiff.

We admit that under the rule of Brown *v.* Fletcher, 235 U. S. 589, the vendee or assignee may bring an action to recover an interest in property, or damages for its unlawful detention without coming

within the scope of subdivision (1) of section 24 of the Judicial Code. But this is not such an action; for in such an action (being an action at law) by no possibility could the plaintiff join the American Surety Company. The basis of such an action is the right of the plaintiff to certain property under the will of Jane Van Schaick. The liability of Henry Van Schaick, or of his executor, depends on that right. The liability of the American Surety Company, if there be any, springs solely from its bond.

In like manner, it may be possible to spell out from the facts stated in the complaint a cause of action at law against Henry Van Schaick or his estate for a devastavit. But no such action exists against the American Surety Company, and the cause of action at law for a devastavit against the executor of Henry Van Schaick is wholly different from the cause of action at law against the American Surety Company on its bond. Under the Code of Civil Procedure regulating actions at law in New York, the two actions cannot be joined in one action (Code of Civil Procedure, sec. 484).

While in a proper suit in equity for a devastavit and an accounting against the estate of Henry Van Schaick it might be possible to join the sureties on his bond, in an action at law this is not permissible because the sureties would not be interested in the cause of action for a devastavit against the estate of Henry.

Nichols v. *Drew*, 94 N. Y. 22;
Roehr v. *Liebmann*, 9 App. Div. 247;
Barton v. *Speis*, 5 Hun 60;
People v. *Equitable Life Assurance Society*, 124 App. Div. 714;
Green v. *Dunlop*, 136 App. Div. 116.

The law is clear that, when the facts on which recovery is sought are stated in a single count, the

complainant will be confined to the cause of action which, upon a fair construction of the complaint, appears to have been the one selected.

Farmers & Merchants Natl. Bank v. *Smith*, 77 Fed. 129.

In that case, the court said (p. 134):

> "If a plaintiff intends to demand a judgment on different grounds, he should state the facts constituting the several causes of action in separate counts, so as to advise the court and the opposite party of his intention. The Code of the State where this cause originated provides that, 'where a petition contains more than one cause of action, each shall be separately stated and numbered' . . . When this provision of the Code is disregarded, and the facts constituting a cause of action are stated in a single count it may well be concluded that the pleader intended to rely upon a single ground of recovery, and in such cases he should be confined to the cause of action which, upon a fair construction of the complaint, he appears to have selected."

The complaint states a good and sufficient cause of action at law against both of the defendants on their bond. The complaint states no other cause of action against both of the defendants. The complainant must be held to have intended the cause of action which appears upon the face of the complaint.

In any event it is clear that the rule in *Brown* vs. *Fletcher* (*supra*) would not apply to any cause of action against the American Surety Company. The liability of that company is solely contractual.

SECOND.

The cause of action against the American Surety Company is based on an assignment of the bond.

The bond runs:

> "unto such descendants of the said Henry Van Schaick as shall be living at the time of his death . . . to be paid to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

The bond was given as security for the performance of an obligation running from Henry Van Schaick to Eugene Van Schaick, a descendant of Henry Van Schaick. Eugene Van Schaick assigned that obligation to the plaintiff. The assignment of this, the main obligation, operated as an assignment of the collateral obligation of the American Surety Company. No formal assignment of the collateral obligation is necessary.

Tate v. *George*, 102 U. S. 564, at page 571;
Craig v. *Parkis*, 40 N. Y. 181;
Stillman v. *Northrup*, 109 N. Y. 473.

Such an assignee, though no formal assignment has been given, holds under a derivative title, so that the defendant can urge the same offsets as he could against an assignor, had there been a formal assignment.

Barlow v. *Myers*, 64 N. Y. 41;
Kleeman v. *Frisbie*, 63 Ill. 482.

Although no formal assignment has been given, such an assignee is an assignee within subdivision (1) of section 24 of the Judicial Code.

Shoecraft v. *Bloxham*, 124 U. S. 730;
Plant Investment Co. v. *Jacksonville, &c., Ry.*, 152 U. S. 71.

The case last cited came up upon appeal from a decree sustaining a demurrer on the ground of lack of jurisdiction. To encourage improvements, the State of Florida conveyed certain lands to trustees, the lands and the proceeds thereof to be held as an improvement fund. The legislature reserved the right to grant portions of the lands to railroads. The legislature granted certain of these lands to the Jacksonville, Tampa & Key West Railway Company and the the trustees of the Improvement Fund passed a resolution locating these lands and entered into a contract with the railroad to convey them. The grants were subject to the proper construction, etc., of the railroad.

Later, the complainant contracted with the Jacksonville, &c., Railway to construct the southern portion of its system and was to receive as part of the consideration the land to which the defendant company was or might be entitled. The trustees refused to convey all the designated land. The court said (p. 77):

> "The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the Internal Improvement Fund and the defendant railway company, but the term 'assignee' in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees and therefore brings the suit within the prohibition of Section 629 of the Revised Statutes."

THIRD.

Unless it be an assignee, the plaintiff cannot enforce the obligation of the bond.

The plaintiff, in the last point of its brief, would seem to indicate that it is in a position to enforce the contractual liability of the American Surety Company on its bond, not because it is an assignee thereof, but because it is one of the persons described in the bond. On the face of the bond there is, of course, absolutely no basis for such a contention.

The bond, as we have indicated above, runs

> "unto such descendants of said Henry Van Schaick as shall be living at the time of his death . . . payable to them, their executors, administrators or assigns" (Record, p. 8, fol. 16).

Thus the descendants of Henry Van Schaick, their executors, administrators or assigns, are the only obligees nominated in the bond, and the plaintiff must therefore claim either as a descendant or an assignee of a descendant.

Similarly, the condition of the bond makes it plain that only the descendants of Henry Van Schaick, or those claiming through them, are the beneficiaries. The bond first describes the rights of these descendants in the fund; it says:

> "Whereas by a decree of distribution . . . it is provided among other things that one-half of the net proceeds of such property sold in the said partition suit which one half amounts to sixty seven thousand, one hundred and eighty four dollars and eighty seven cents ($67,184.87) is adjudged to belong to said above bounden Henry Van Schaick for and during the term of

his natural life, and that at the time of his death the said share shall pass to and vest absolutely in such of the descendants of said Henry Van Schaick as shall then be living" (Record, p. 9, fol. 16).

The condition of the bond provides that this fund

"shall thereafter be duly accounted for and paid to his descendants as provided for in the decree aforementioned" (Record, p. 9, fol. 17).

It is therefore plain that the plaintiff not being one of the descendants of Henry Van Schaick, must claim, if at all, as an assignee.

But the plaintiff seems to argue that the provisions of the bond should be enlarged and modified so as to read into the bond certain provisions of the referee's report or of the decree, because, it says, the bond was given in pursuance of the terms of the decree.

The plaintiff's argument seems to be that, while the bond ran to the descendants of Henry Van Schaick or their assigns, the decree contemplated a bond which would run

"to the descendants . . . and to such other persons as shall be entitled upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest" (Record, p. 37, fol. 68).

The decree, however, it may be said in passing, does not require but only suggests the provisions to be inserted. It states that the security "may consist" (Record, p. 37, fol. 68) of a certain kind of a bond. Whether the undertaking which the American Surety Company was willing to make measured up to the original provisions of the decree or not, is immaterial. Such as it was, it was approved by the court as sufficient (Record, p. 6, fol. 11).

But even if the decree had explicitly required a bond to be given in the terms of the decree, the obligation of the bond actually given, if clear and unambiguous, could not be enlarged.

American Exchange National Bank v. *Goubert*, 210 N. Y. 421.

In that case a bond was given pursuant to an order of the court. This order provided that an undertaking should be filed agreeing to indemnify and hold harmless the American Exchange National Bank

> "from any and all damage, interest, cost or other expenses by reason of or growing out of the issuance or continuance of the injunction and as security for the amount of indebtedness claimed to be due to the defendant and for which it claims to hold said certificate of stock as collateral" (p. 423).

The bond as filed indemnified and held harmless the bank

> "from any and all damage, interest, cost or other expenses by reason of or growing out of the issuance or continuance of the injunction as security for the amount of the indebtedness claimed to be due the defendant and for which it claims to hold a certificate of stock as collateral" (p. 424).

The Court said (p. 426):

> "We are thus confronted by an order which requires an undertaking not merely to pay the damages resulting from the injunction but also to pay the debt and a bond given in assumed compliance with the order, which is confined to the payment of the damages alone. The question is, how far conditions in respect of which the bond is silent may be incorporated into it so as to conform its meaning to the requirements of the

> order. That this bond was supposed to constitute a compliance with the order is not doubtful. The fact that it was made with that intent is stated in substance in its recitals. If the meaning of the bond were doubtful or ambiguous, we should have the right, in view of those recitals, to limit or to enlarge its operation accordingly (*Sonneborn* v. *Libbey*, 102 N. Y. 539, 550; *Elmendorf* v. *Lansing*, 5 Cow. 468; *Smith* v. *Molleson*, 148 N. Y. 241, 246). We think, however, that a court is without power to interpolate a new condition into a bond that is free from ambiguity in order to force a correspondence between the bond and the order under which it was executed. The order may be referred to for the purpose of explaining a doubtful phrase, but not for the purpose of inserting a new condition, and thus reforming the contract."

The change which the plaintiff is seeking to import into the bond does not involve a mere technicality but vitally affects the rights of the American Surety Company, for, simultaneously with the issuance of the bond, the American Surety Company obtained a full release of all obligation from Eugene Van Schaick and other descendants of Henry Van Schaick (see Answer, Second Defense, p. 18, fol. 34, Exhibit A, p. 24), and it also obtained within a few days a bond of indemnity signed by Eugene Van Schaick and other descendants of Henry Van Schaick indemnifying the American Surety Company from all liability under the bond (see Answer, Third Defense, p. 18, Exhibit B, p. 25). Thus, the American Surety Company was willing to enter into its covenant with the descendants of Henry Van Schaick only on the footing that its liability to Eugene Van Schaick and his assigns should be extinguished. In effect, what the American Surety Company did was to enter into a contract which limited its liability to the grandchildren while the immediate children of Henry Van Schaick,

being of age, were willing to waive all security because they trusted their father's integrity. It would entirely change the contract if the persons to whom the children assigned their interest in the estate could claim the security, not under a derivative title, but as original promisees of the American Surety Company so that all equities between that Company and the assignors should be barred.

FOURTH.

As the court below did not have jurisdiction of the only cause of action stated in the complaint, the dismissal of the complaint for lack of jurisdiction was proper.

But as we understand it, the plaintiff argues that the question whether it is entitled to sue, not as an assignee but as a person described in the bond, should have been tried on the merits, the court assuming jurisdiction, and then dismissing the complaint on the merits if the contention of the plaintiff were not well founded.

The difficulty with this argument is that (if we are right in our contention) the pleading stated a good cause of action under which the plaintiff sued the American Surety Company as assignee, whether under an express or implied assignment. It stated no other cause of action. The court was without jurisdiction to assume that cause of action. It was therefore bound to dismiss the complaint for lack of jurisdiction.

Manifestly the court must have power to determine the nature of the action as a basis for its decision as to jurisdiction. Otherwise the court would in every case be concluded by the mere as-

sertion of the plaintiff that the pleading contained a cause of action of which the court would have jurisdiction.

Defiance Water Co. vs. *Defiance*, 191 U. S. 184;
Underground R. R. Co. vs. *City of N. Y.*, 193 U. S. 416;
Shoecraft v. *Bloxham*, 124 U. S. 730.

In *Shoecraft* vs. *Bloxham* the Court said (p. 736):

"If he has no interest in the contract, he has no standing in court to ask its enforcement, and if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the Circuit court by section 629 of the Revised Statutes."

Respectfully submitted,

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BRAINERD, SHALER & HALL QUARRY COMPANY *v.* BRICE, AS SOLE SURVIVING EXECUTOR OF VAN SCHAICK, ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 431. Submitted March 17, 1919.—Decided June 2, 1919.

The allegations of the complaint determine the character of an action for the purpose of testing the jurisdiction of the District Court to entertain it. P. 231.

The life tenant of a fund, to secure the remaindermen, executed, with surety, a bond running to them, their executors, administrators and assigns, and conditioned for the preservation of the fund by him and payment to them upon his death. One of them assigned part of his remainder interest to a third person, who, after the death of the life tenant, brought an action on the bond against the life tenant's executor and the surety jointly, to recover in the amount of the assigned remainder interest. *Held*, that the assignment of the remainder interest carried with it *pro tanto* the obligation of the bond; and that the action was one prosecuted by an assignee to recover on a chose in action, not cognizable by the District Court, where the assignor and the defendants were citizens of the same State. Jud. Code, § 24. P. 233. *Brown* v. *Fletcher*, 235 U. S. 589, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Edwin D. Worcester for plaintiff in error.

Mr. Bronson Winthrop for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

The Quarry Company brought an action at law in the District Court of the United States for the Southern District of New York to recover $20,000 and interest from Wilson B. Brice as executor of Henry Van Schaick, deceased, and the American Surety Company. Answers were filed and the case was at issue, and came on for trial, when, upon motion of the defendants, the action was dismissed for want of jurisdiction. The only question here concerns the correctness of this ruling of the District Court. The ground of the dismissal is thus stated in the record:

"In this cause, I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds:

"This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said

Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made."

Section 24 of the Judicial Code, among other things, provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

To determine the character of the action for the purposes of jurisdiction recourse must be had to the allegations of the complaint. They are quite voluminous, but for our purposes may be summed up as stating: The plaintiff is a corporation of the State of Connecticut, the defendant, the American Surety Company, is a corporation of the State of New York. The defendant, Wilson B. Brice, is a resident and citizen of the State of New York. (It was conceded for the purposes of the motion that Eugene Van Schaick was a citizen of New York.) Jane C. Van Schaick died May 20, 1893, seized of certain real estate in the State of New York. By her last will and testament she gave one-half of her real estate to Henry Van Schaick of New York during his life, with remainder to his descendants who should be living at the time of his decease and living also at the time of the testatrix' decease, if she should survive him. The will was duly probated on June 28, 1893. Henry Van Schaick survived the testatrix, and had living children, one of whom was Eugene

Van Schaick. The complaint then recites certain conveyances, and the prosecution of a partition suit, the decree in which was, by order of the court, considered upon the motion to dismiss. In that suit it was adjudged that Henry Van Schaick had an estate as tenant for life in one-half of the said real estate, that among others Sarah Van Schaick, wife of Eugene Van Schaick, had an estate in remainder in the land to commence in possession upon the death of Henry Van Schaick. It being found that the land could not be divided, it was ordered sold. The sale for $134,369.74 is recited. One-half of the proceeds $67,184.87, was found to belong to Henry Van Schaick for life, at his death to vest in such descendants of Henry Van Schaick as should be then living, or in such persons as should then be the legal owners of said shares. The decree provided that the fund might be paid to Henry Van Schaick upon his giving security to the remaindermen, and provision was made for giving the bond now sued upon. Henry Van Schaick as principal and the American Surety Company then executed the bond in the sum of $75,000. The obligees of the bond were the descendants of Henry Van Schaick living at the time of his death, the amount to be paid to them, their executors, administrators or assigns. The condition of the bond was that Henry Van Schaick during his lifetime should safely keep and preserve said principal sum, and the same should be paid over to his descendants as provided in the decree. Eugene Van Schaick acquired the interest which had been assigned to his wife. On May 9, 1901, Eugene Van Schaick assigned to the Quarry Company the sum of $20,000, to be paid out of his remainder interest. Henry Van Schaick died on November 15, 1914, leaving Eugene Van Schaick and others surviving him. Eugene Van Schaick died on January 27, 1916. Henry Van Schaick did not keep and preserve the principal of said $67,184.87, the same was not paid as provided in the decree, but was lost by said Henry

Van Schaick. The complaint avers demand of the $20,000 and interest, and prays judgment against the defendants.

The action thus appears to have been brought upon the assignment of Eugene Van Schaick, a citizen of New York, to the plaintiff, a corporation of Connecticut, against defendants, who were residents and citizens of New York. Eugene Van Schaick could not have maintained the suit in the federal court, being himself a citizen and resident of New York. This suit was an action at law upon the bond. It was against both the executor and the surety company. The surety company was liable at law only upon the bond. The complaint, fairly considered, shows that such was the real nature of the suit. It contained but a single cause of action, and prayed for joint judgment against the executor of Henry Van Schaick and the surety company. Henry Van Schaick was liable to Eugene Van Schaick upon the bond. Eugene Van Schaick assigned that obligation to the plaintiff to the extent of $20,000. That assignment carried with it the obligation of the surety company given to secure the faithful performance of the duty required of Henry Van Schaick. *George* v. *Tate*, 102 U. S. 564, 571.

The defenses, if any, of the surety company against the claim in the hands of Eugene Van Schaick could have been urged against the plaintiff. We think the plaintiff was an assignee within the meaning of § 24, without formal assignment of the bond. *Shoecraft* v. *Bloxham*, 124 U. S. 730; *Plant Investment Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 152 U. S. 71.

Brown v. *Fletcher*, 235 U. S. 589, is an entirely different suit from the one now under consideration. In that action there was an assignment of an interest in a trust estate by the beneficiary, who was a resident and citizen of New York, to the complainants who were residents and citizens of Pennsylvania, and suit was brought in the District Court of the United States for the Southern District of